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FEB 25 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. STEVEN IGNACIO MARQUEZ, Appellant.	2 CA-CR 2009-0228 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200701632

Honorable Janna L. Vanderpool, Judge

AFFIRMED IN PART; VACATED IN PART

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Steven Marquez was convicted of aggravated assault with a deadly weapon, second-degree burglary, and weapons misconduct

involving his possession of a firearm while being a prohibited possessor. On appeal, Marquez challenges the sufficiency of the evidence to support his convictions for aggravated assault and burglary. He also contends the trial court erred in both enhancing the presumptive, 7.5-year prison term for aggravated assault and ordering that the term be served in its entirety, a "flat-time" term. Finally, relying on this court's recent decision in *State v. Payne*, 561 Ariz. Adv. Rep. 11 (Ct. App. July 24, 2009), Marquez challenges the court's imposition of the $1,000 prosecution fee. Although we vacate the prosecution fee, we affirm Marquez's convictions and sentences in all other respects.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). On October 6, 2007, K. was awakened by a woman's scream outside her trailer. K. went to her front door, where she saw Marquez standing in her driveway. She then noticed a woman, J.L., and another man, Michael Smith, in her front yard. Smith "had a hold of [J.L.] by her hair." When K. attempted to assist J.L, Marquez pulled a gun out of his pants, pointed it at her face, and told her to back up. Smith eventually let go of J.L. and J.L. went inside K.'s trailer. Marquez, Smith, and K. followed. K. told them to leave, but all three remained. Unbeknownst to K., another man, whom K. did not know and had never seen before, had been hiding inside her trailer. Marquez apparently had lent money to the man and had followed him to the trailer park to collect it. Smith and the man argued inside the trailer and after fifteen to twenty minutes, Marquez, Smith, J.L., and the unidentified man left. K. then called police.

¶3 After a four-day trial, the jury found Marquez guilty of all charges. The trial court sentenced Marquez to concurrent, enhanced, presumptive prison terms, the longest of which was the 7.5-year term for aggravated assault. This timely appeal followed.

Discussion

I. Sufficiency of Evidence

¶4 Marquez first argues there was insufficient evidence to support his convictions for aggravated assault and burglary, and the trial court therefore erred in denying his motion for a judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P. We review the court's denial of a Rule 20 motion for an abuse of discretion. *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007). And, we will reverse only if there is "no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20; *see also State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Mathers*, 165 Ariz. at 66, 796 P.2d at 868, *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980).

A. Aggravated Assault

¶5 Marquez first contends "the aggravated assault conviction cannot stand" because K. testified that she had not been "in fear for herself." *See* A.R.S. §§ 13-1204(A)(2), 13-1203. The state concedes that, "[b]ased on [K.'s] testimony, it does not appear that K. was placed in apprehension of imminent bodily injury. Accordingly, it

appears that [Marquez]'s conviction for aggravated assault is untenable." We disagree. There was ample evidence to support the jury's verdict that Marquez had committed aggravated assault against K. *See State v. Sanchez*, 174 Ariz. 44, 45, 846 P.2d 857, 858 (App. 1993) (appellate court not required to accept state's confession of error).

¶6 A person commits aggravated assault by "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury," § 13-1203(A)(2), while "us[ing] a deadly weapon or dangerous instrument," § 13-1204(A)(2).[1] Thus, at trial, "[t]he State had the burden . . . of proving that [Marquez] intended to place [K.] in reasonable apprehension of immediate physical injury," while using a gun. *See State v. Johnson*, 205 Ariz. 413, ¶ 6, 72 P.3d 343, 346 (App. 2003). It is undisputed that when K. approached Marquez outside the trailer, Marquez drew his gun and pointed it directly at K. At trial, K. testified Marquez had pointed the gun directly at her face and she could see it had "a very big bullet in it." Thus, the only question is whether the state met its burden of proving K. reasonably apprehended imminent physical injury to herself.

¶7 K. also testified that when Marquez pointed the gun at her, she had not been "thinking about [her] safety." And when asked whether she was "concerned about [her]self being shot or injured," she replied "just my grand babies." However, the prosecutor later questioned whether K. believed she had "put [her] life in harm's way to protect [her grandchildren's] lives, and she stated, "Yes, I did." She also stated she

[1]Aggravated assault may also be committed by intentionally, knowingly, or recklessly causing physical injury to another person or knowingly touching another person with intent to injure, insult, or provoke that person. § 13-1203(A)(1), (3). However neither of these subsections is relevant here.

"would do anything to protect [her family]" and agreed that "it was [her] instinct as a mom that said I'm willing to sacrifice what might come of me to help my [family]." She further agreed that, "based on her own experience and feelings, . . . [i]f a person points a gun at a[nother] person, . . . the person that is having the gun thrust in their face is in danger." And she acknowledged that "[i]f it [had]n't [been] for [her] grand babies being in harm's way, . . . [she w]ould . . . have been afraid [of] having that weapon in [her] face." Finally, when asked whether she "felt like [she] could have whooped [Marquez] . . . if there wasn't a gun involved," she stated she "sure would have tried."

¶8 In his Rule 20 motion, Marquez argued K.'s testimony "made it clear and unambiguous that she did not have that subjective actual apprehension of harm. . . . The focus was on the grandchildren and protecting them. That's laud[a]ble. That's understandable. . . . But based on her own testimony, it's not aggravated assault." The state responded, "It was the motherly instinct that trumped the fear that she had for herself and caused her to act in a way that may have seemed unusual when you understand that Mr. Marquez had a loaded weapon pointed in her face, but that doesn't mean that she wasn't afraid, Judge. In fact it shows that she was afraid." The state further argued: "The standard is could a reasonable jury find substantial evidence that the element was met . . . . And the State submits, Judge, that there is." In denying Marquez's motion, the trial court stated:

> I believe there is sufficient evidence from which the jury can conclude that the victim was . . . intentionally placed in reasonable fear, apprehension, whatever word we want to use. . . . I think there are about 14 different ways that her testimony could be interpreted. And they may all come to the

> same conclusion or they may not, but that's something for the jury to decide.

¶9 Although K.'s testimony may have been equivocal on the issue of "reasonable apprehension," the trial court correctly concluded it was for the jury to interpret her testimony. K. testified she lacked "concern[]" for her own safety, but she also stated she "was willing to sacrifice what might come . . . to help [her family]." She further testified that she would have tried to resist Marquez had he not been holding a gun and, had she not feared for her grandchildren, she would have feared for herself. And, to the extent her testimony could be construed as contradictory, the jurors were in the best position "to assess [K.'s] demeanor and credibility [to] help[] them decide which of [K.]'s accounts to believe." *See State v. Rutledge*, 205 Ariz. 7, ¶ 24, 66 P.3d 50, 55 (2003); *see also State v. Uriarte*, 194 Ariz. 275, ¶ 41, 981 P.2d 575, 583 (App. 1998) (Gerber, J., concurring) ("When witness[] proffer[s] contradictory testimony, the trier of fact assesses the quality of the testimony by weighing its credibility and assigning greater value to the most credible testimony based on perceptible aspects of witness demeanor."). We will not reweigh K.'s testimony on review. *State v. Rodriguez*, 205 Ariz. 392, ¶ 18, 71 P.3d 919, 924 (App. 2003). "'If reasonable minds can differ on the inferences to be drawn from the evidence, a trial court has no discretion to enter a judgment of acquittal and must submit the case to the jury.'" *Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d at 1056, *quoting State v. Alvarez*, 210 Ariz. 24, 27, 107 P.3d 350, 353 (App. 2005), *vacated in part on other grounds*, 213 Ariz. 467, 143 P.3d 668 (App. 2006). The court therefore

did not abuse its discretion in denying Marquez's Rule 20 motion on the aggravated assault charge.[2]

B. Burglary

¶10 "A person commits burglary in the second degree by entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein." A.R.S. § 13-1507. On appeal, Marquez does not challenge that he unlawfully entered or remained in K.'s residence. Rather, he argues only that there was no evidence he "commit[ed] any theft . . . [or] any other felony" while inside.

¶11 "[T]he crime of burglary is complete when entrance to the structure is made with the requisite criminal intent. Burglary does not require the successful completion of the underlying felony." *State v. Bottoni*, 131 Ariz. 574, 575, 643 P.2d 19, 20 (App. 1982) (citation omitted). At trial, Marquez testified that after he had drawn his gun on K. outside the trailer, he put it away as soon as he recognized she was not the person for whom he had been looking. However, K. testified that Marquez "had th[e] gun in his hand pointed at [her] the whole time until [she] got to the end of [her] trailer" and that he did not put the gun away until "after [they] went back into the house." She then clarified that Marquez "had [the gun] out, not the whole time. I believe he put it in his waistband

[2]We question whether "fear" of an imminent physical injury is required to sustain an aggravated assault conviction. This court has stated, in dicta, that fear is not "necessarily the equivalent of being in 'reasonable apprehension of imminent physical injury.'" *State v. Johnson*, 205 Ariz. 413, n.6, 72 P.3d 343, 348 n.6 (App. 2003). *The American Heritage Dictionary* 121 (2d college ed. 1982), defines apprehend as "to grasp mentally; understand" as well as "to look forward to fearfully," and *Black's Law Dictionary* 97 (7th ed. 1999), similarly characterizes apprehension as "[p]erception; comprehension" and alternatively as "[f]ear; anxiety."

after they stopped arguing inside the house." She also testified that she did not call the police until after Marquez left because she had been "afraid that—being that he had a gun[—]that if he didn't want to leave and the cops showed up that there would be a gunfight."

¶12 Although Marquez's testimony conflicted with K.'s about when Marquez stopped threatening K. with the gun, the determination of witness credibility is a matter for the jury to decide. *State v. Canez*, 202 Ariz. 133, ¶ 39, 42 P.3d 564, 580 (2002). K.'s testimony established that Marquez had entered K.'s trailer while still brandishing the weapon. Thus, there was sufficient evidence from which the jury could have concluded beyond a reasonable doubt that Marquez had entered or remained in K.'s residence with the intent to continue his aggravated assault of her while Smith, J.L., and the third, unidentified man argued about the money allegedly owed to Marquez. *See Mathers*, 165 Ariz. at 66, 796 P.2d at 868. We therefore cannot say the trial court abused its discretion in denying the Rule 20 motion on the burglary charge. *See Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d at 1056.

II. Prosecution Fee

¶13 Marquez next argues the trial court erred when it imposed a $1,000 prosecution fee, in contravention of this court's ruling in *State v. Payne*, 561 Ariz. Adv. Rep. 11, ¶ 49 (Ct. App. July 24, 2009). The state concedes error, and we agree. In *Payne* this court concluded that Pinal County's prosecution fee "was statutorily unauthorized," making it "illegal to include that assessment as part of [a defendant's] sentencing[]." *Id.* Neither party has indicated whether Marquez objected to the prosecution fee below, but

such an illegal sentence would, in any event, constitute fundamental error. *Id.* We therefore vacate the court's order imposing the prosecution fee.

III. Flat-Time Sentencing

¶14 Last, Marquez contends the trial court erred by enhancing his sentence for aggravated assault as a dangerous offense pursuant to A.R.S. § 13-704,[3] and additionally imposing a flat-time, presumptive prison term pursuant to A.R.S. § 13-708(A) based on his having committed the offense while on probation.[4] Marquez concedes "[t]he state alleged and proved [he] was on probation at the time [the] offense [was committed]," and he does not dispute that aggravated assault with a deadly weapon qualifies as a dangerous offense under the statute. But, he contends: "The State cannot mix and mingle the statutes . . . . Either [Marquez] was found guilty of a . . . dangerous offense, or he was found guilty of a nondangerous offense with the enhancements for [a] prior conviction

[3]The Arizona criminal sentencing code has been renumbered, effective "from and after December 31, 2008." *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes, *see id.* § 119, we refer in this decision to the current section numbers rather than those in effect at the time of the offense in this case.

[4]To the extent Marquez asserts in his reply brief that he lacked notice the state was seeking a flat-time sentence for the aggravated assault charge because the state incorrectly cited to § 13-708(A) rather than (B), he failed to raise this argument in the trial court or in his opening brief. It is thus waived. *See State v. Ruggiero*, 211 Ariz. 262, n.2, 120 P.3d 690, 695 n.2 (App. 2005). In any event, we would not find this oversight was fundamental error. Before sentencing, Marquez had actual notice the state intended to enhance his sentence pursuant to subsection (A). *See State v. Noriega*, 142 Ariz. 474, 482-83, 690 P.2d 775, 783-84 (1984) (actual notice of state's intent to enhance pursuant to § 13-708(A) cures accidental citation to subsection (B) in state's original allegation of enhancement), *overruled in part on other grounds by State v. Burge*, 167 Ariz. 25, 804 P.2d 754 (1990).

and probation[ary] status." He appears to be arguing that his sentence for aggravated assault could not be enhanced under §§ 13-704 and 13-708 simultaneously. However, Marquez has cited no authority to support this claim and we are aware of none. We thus reject this argument.

Disposition

¶15 For the reasons set forth above, we vacate the trial court's order requiring Marquez to pay a $1,000 prosecution fee. But, we affirm his convictions and sentences in all other respects.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge